

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
THE MUSEUM OF MODERN ART, and THE  
SOLOMON R. GUGGENHEIM FOUNDATION,

Plaintiffs,

BOY LEADING A HORSE, and LE MOULIN DE  
LA GALETTE, Two Paintings by Pablo Picasso,

Plaintiffs-in-rem,

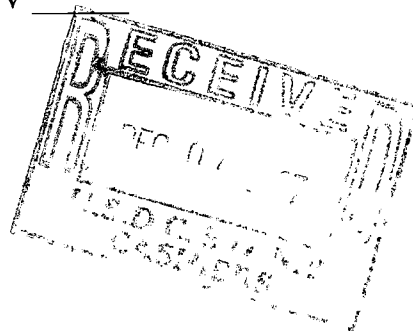
- against -

JULIUS H. SCHOEPS,

Defendant.  
-----X

07 CV 11074

Complaint for Declaratory Relief  
Index No. CV



Plaintiffs The Museum of Modern Art (“MoMA”) and The Solomon R. Guggenheim Foundation (the “Guggenheim”) (collectively, the “Museums”), through their undersigned counsel, Cleary Gottlieb Steen & Hamilton LLP, allege as follows:

NATURE OF THE ACTION

1. This action concerns two iconic paintings by Pablo Picasso, *Boy Leading a Horse* (1906), which MoMA acquired as a gift from William S. Paley (“Paley”) in 1964 and absolutely acquired on Paley’s death in 1990, and *Le Moulin de la Galette* (1900), which Justin K. Thannhauser (“Thannhauser”) bequeathed and transferred to the Guggenheim in 1963 as part of a gift of many important works and which the Museum absolutely acquired in 1978 following Thannhauser’s death in 1976. Thannhauser was a leading Jewish art dealer in Berlin who was forced to flee Germany in 1937. Paley was the son of a Ukrainian Jewish immigrant, an important collector of modern art, a successful businessman and President and then Chairman of MoMA.

2. These two paintings (the “Paintings”) had at one time been part of the private collection of Paul Robert Ernst von Mendelssohn-Bartholdy (1875-1935) (“von Mendelssohn-Bartholdy”), a prominent and affluent German banker and art collector, patriarch of one branch of an extraordinarily distinguished German family of Jewish descent, representative of that branch of the family as a director of Mendelssohn & Co. Bank, and proprietor of the ancestral estate outside of Berlin, Schloss Börnicke. When he married for a second time in 1927, von Mendelssohn-Bartholdy gave the Paintings, along with the other paintings in his collection, to his second wife, Elsa Lucy Emmy Lolo von Lavergue-Peguilhen (1899-1986) (later Countess Kesselstatt), who was not Jewish. Von Mendelssohn-Bartholdy died of heart problems in a Berlin sanatorium in May 1935. He had no children. As he had earlier given his art collection to his second wife, it was excluded from his estate by his last will.

3. The Paintings, which were likely sent to Switzerland for sale or exhibition as early as March 1933, were exhibited in Buenos Aires in October 1934. Some time between July 1934 and August 1935, the Paintings were sold to Galerie Thannhauser, which had branches in Berlin and Lucerne, and were again in Switzerland by August 1935 at the latest. In August 1936, *Boy Leading a Horse* was sold through Thannhauser’s partner Siegfried Rosengart (“Rosengart”) and dealer Albert Skira to Paley in Switzerland. *Le Moulin de la Galette* was part of Thannhauser’s personal collection when he emigrated to the United States in 1940.

4. This action arises out of a challenge to the Museums’ ownership of the Paintings asserted by defendant Julius H. Schoeps (“Schoeps”). Schoeps purports to represent the heirs of von Mendelssohn-Bartholdy. Schoeps’ grandmother was one of von Mendelssohn-Bartholdy’s five siblings. Schoeps asserts no connection to the heirs of von Mendelssohn-Bartholdy’s second wife, to whom von Mendelssohn-Bartholdy gave the Paintings in 1927.

5. The issue Schoeps raises is solely whether the sale of the Paintings to Galerie Thannhauser by August 1935 was a forced sale. In letters addressed to each of the Museums dated March 28, 2007, defendant's counsel alleged that the sales of the Paintings to Thannhauser were made under duress due to Adolf Hitler's rise to power in 1933 and the effects of the Nazi regime on the von Mendelssohn-Bartholdy family due to their Jewish descent. In subsequent letters to each of the Museums dated November 1, 2007, counsel asserted again that his client Schoeps had valid claims of title to the Paintings, and demanded that they be returned. Contemporaneously with the filing of this action, the Museums are rejecting this demand.

6. Schoeps' claim that von Mendelssohn-Bartholdy's heirs are the rightful owners of the Paintings is very similar to the claim he recently brought in the New York courts, first in federal court and then in state court, against the London-based Andrew Lloyd Webber Art Foundation (the "ALWAF"), seeking to recover possession of a Picasso painting entitled *Portrait of Angel Fernandez de Soto* (1908), which was scheduled to be sold at Christie's in New York. This painting, along with the Paintings and two other paintings (for a total of five), were all owned by von Mendelssohn-Bartholdy, exhibited in Buenos Aires in October 1934, and sold to Galerie Thannhauser together by August 1935. On November 7, 2006, Schoeps' federal court complaint was dismissed for lack of either diversity jurisdiction (suits between foreigners are not diverse) or federal question jurisdiction. The following day, Schoeps filed suit in the New York State Supreme Court for New York County. On November 19, 2007, The Honorable Rolando T. Acosta, J.S.C., dismissed that complaint, finding that Schoeps' failure to obtain letters from Surrogate's Court appointing him as the personal representative of von Mendelssohn-Bartholdy's estate prevented him from bringing his claim. Since then, the ALWAF has instituted an action in

Great Britain, where *Portrait of Angel Fernandez de Soto* is now located, to defend its ownership of that painting, and Schoeps has filed a notice of appeal of Judge Acosta's order of dismissal.

7. In keeping with their ethical standards and obligation to honor legitimate claims, the Museums have carefully researched and investigated the provenance of the Paintings, including the factual circumstances surrounding the sale of the Paintings to Thannhauser. The Museums have concluded, for the reasons detailed below, that Schoeps' claims are completely without merit.

8. MoMA and the Guggenheim are prepared to have all factual and legal issues surrounding Schoeps' claims to the Paintings resolved by this Court. They therefore bring this action for a declaration: (a) that contrary to Schoeps' contention, there is no legal or factual basis for a presumption of duress; (b) that the available facts establish that there was no duress with respect to the sale of the Paintings, whether any such presumption exists or not; (c) that Schoeps' claims are barred by the equitable doctrine of laches under New York law due to the prejudice to the Museums' defense of their title to the Paintings arising from defendant's unreasonable delay in asserting these claims; (d) that Schoeps' claims are also barred by the laws of Switzerland and Germany, in one or the other of which jurisdictions the allegedly duress-caused sales were made, due to the good faith of the purchasers and the continuous possession of Thannhauser and Paley for the period specified under Swiss and German laws; (e) that, in any event, Schoeps is not a proper claimant to ownership of these Paintings; and (f) that, accordingly, the claims of ownership made by Schoeps to the Paintings are without merit.

## JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a), because there is complete diversity of citizenship between plaintiffs and defendant and the matter in controversy exceeds \$75,000, exclusive of interest and costs.

10. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (c), because defendant Schoeps is subject to personal jurisdiction here, and the Paintings that are the subject of this dispute are located in this District.

11. This Court has jurisdiction to grant the requested relief pursuant to 28 U.S.C. §§ 2201(a) and 2202.

12. This Court may exercise personal jurisdiction over the defendant because he has availed himself of the protection of New York law in relation to a similarly situated work of art formerly owned by von Mendelssohn-Bartholdy and purchased by Thannhauser together with the Paintings, because he has transacted business in New York in relation to the Paintings by demanding surrender of possession in New York, and because the Paintings are located in this district and defendant is therefore subject to service of process pursuant to 28 U.S.C. § 1655.

## THE PARTIES

13. Plaintiffs are two prominent museums in New York City. Both are not-for-profit New York education corporations holding their assets (including the Paintings) for the public trust. Plaintiffs are legally obligated to maintain and protect those assets for the benefit of the public.

14. Founded in 1929, MoMA is the largest and finest museum of its kind in the world. More than 2.4 million people visit MoMA each year to see its permanent collection

and scores of special exhibitions. The collection, which is unparalleled in its scope and depth, numbers more than 100,000 works in all media dating from the 1880s to the present.

15. *Boy Leading a Horse* is one of the most important and well-known paintings in MoMA's collection. It has been exhibited throughout the world since being purchased by Paley in 1936, including frequent exhibition in the Museum's galleries both during Paley's life and after he died in 1990. *Boy Leading a Horse* has been exhibited in virtually every major exhibition of Picasso's work from 1939 to the present, including MoMA's historic 1980 Picasso retrospective, attended by 1.1 million people. In addition, the Painting was part of an exhibition of Paley's collection that toured 16 major museums in the United States, Canada, Japan and Australia in the 1990s. The cover of the catalogue accompanying the exhibition featured a reproduction of *Boy Leading a Horse*, and the catalogue specifically noted von Mendelssohn-Bartholdy's previous ownership. A list of publications that include *Boy Leading a Horse* is attached hereto as Exhibit A. The painting was also exhibited in Berlin for seven months in 2004 as part of a major exhibition of works from MoMA's collection. More than one million people attended the 2004 exhibition in Germany. The complete list of exhibitions of *Boy Leading a Horse* is attached hereto as Exhibit B.

16. The Solomon R. Guggenheim Foundation was chartered by the Board of Regents of New York State on June 25, 1937. Originally named the "Museum of Non-Objective Painting," the Guggenheim opened to the public in 1939 under the auspices of the Foundation. The Guggenheim's mission is "to promote the understanding and appreciation of art, architecture, and other manifestations of visual culture, primarily of the modern and contemporary periods, and to collect, conserve, and study the art of our time." The Guggenheim is a world-class institution with a global reach that realizes its mission through its exhibitions,

education programs, research initiatives and publications. Last year, over 2.4 million visitors came to view the art on display in the network of museums that are operated by the Guggenheim in New York, Venice, Bilbao, Berlin and Las Vegas.

17. *Le Moulin de la Galette* is one of the most important and well-known paintings in the Guggenheim's collection. *Le Moulin de la Galette* has been on frequent view in the Thannhauser Galleries at the Guggenheim since 1965 and has been included in many major exhibitions since 1939. The complete list of exhibitions of *Le Moulin de la Galette* is attached hereto as Exhibit C. The Painting is featured on the cover of the Guggenheim's 2001 catalogue for the entire Thannhauser Collection, which is a major component of the Museum's collection. This catalogue specifically noted von Mendelssohn-Bartholdy's prior ownership. Three previous catalogues of the Thannhauser Collection, published by the Guggenheim in 1965, 1972 and 1978, include color reproductions of *Le Moulin de la Galette* and the latter publication also notes von Mendelssohn-Bartholdy's prior ownership. A list of publications that include *Le Moulin de la Galette* is attached hereto as Exhibit D.

18. Both *Boy Leading a Horse* and *Le Moulin de la Galette* have been published extensively in the international literature on Picasso throughout many decades, revered as two of the artist's most important, and representative paintings.

19. Upon information and belief, defendant Schoeps is a resident of Berlin, Germany, and the great nephew of von Mendelssohn-Bartholdy.

#### KNOWN FACTS AND CIRCUMSTANCES

20. Von Mendelssohn-Bartholdy was born in 1875 into a notable German family descended from philosopher Moses Mendelssohn and composer Felix Mendelssohn-Bartholdy. His father was Ernst von Mendelssohn-Bartholdy, who enjoyed immense success as

a banker and wealthy philanthropist and had wide-ranging influence and respect amidst the Prussian royal circles. Kaiser Wilhelm recognized von Mendelssohn-Bartholdy's father's contributions by elevating him to the Prussian aristocracy in the late 1800s.

21. Von Mendelssohn-Bartholdy was a director of the prominent private bank, Mendelssohn & Co., which his family had founded in 1795 and passed down through family hands thereafter. The bank was traditionally headed by a member of each of the two branches of the ancestral family and, during the 1920s and 1930s, Franz von Mendelssohn served as the senior director of the bank, representing one branch of the family, with Paul von Mendelssohn-Bartholdy serving as director from the other branch until his death in 1935.

22. Like his father, a respected and wealthy banker and philanthropist, von Mendelssohn-Bartholdy was also an avid art collector, and built one of the most prominent private modern art collections in Europe, which included works by Vincent van Gogh, Pierre-August Renoir, Henri Rousseau, Georges Braque and other established modern artists. Von Mendelssohn-Bartholdy's collection also included important works by Picasso, including the Paintings. Von Mendelssohn-Bartholdy displayed his art collection in his double-lot house at Alsenstrasse 3/3a in Berlin, which was designed by famed architect Bruno Paul, and at the country estate at Schloss Börnicke, which was remodeled by Bruno Paul after von Mendelssohn-Bartholdy inherited it.

23. Von Mendelssohn-Bartholdy executed his first will in 1910 which provided for his then-wife, Charlotte Reichenheim (later Countess Wesdehlen), to receive a life interest in the family estate, Schloss Börnicke, but provided that, upon her death, the estate, including the land, house and contents would go to his younger brother, Alexander, in accordance with his father's express wish that the family estate remain in the male line of the



family. Von Mendelssohn-Bartholdy, however, expressly excluded from inheritance by Alexander all household property he and his wife Charlotte acquired during their marriage, including property such as furniture, gold and silver, jewelry, and artworks, which his wife was to inherit freely and without restriction.

24. Von Mendelssohn-Bartholdy had a long-standing relationship with Thannhauser, from whom he purchased a number of his works, including *Le Moulin de la Galette* in or around 1910. Thannhauser owned Galerie Thannhauser, a renowned art gallery, founded in the early years of the twentieth century in Munich by Thannhauser's father. The Galerie then expanded to include branches in Berlin, which Thannhauser ran, and in Lucerne, which Thannhauser's cousin, Rosengart, ran. Thannhauser became a leading force in the German and international art community, and the von Mendelssohn-Bartholdys and their extended family became regular and important clients. Due to the rise of the Nazi regime, Thannhauser emigrated to Paris in 1937. He was then forced, in 1939, to remain in Switzerland when the borders with France closed. In 1940, he emigrated to New York.

25. Von Mendelssohn-Bartholdy regularly sent works from his collection on loan to German and international exhibitions at established museums and galleries and for sale on the market. For example, during 1930-34, von Mendelssohn-Bartholdy sent works from his collection to exhibitions in Frankfurt, Paris, Basel, and Buenos Aires. Von Mendelssohn-Bartholdy also refused a request in 1932-33 to loan works by Rousseau to an exhibition at the Kunstverein Basel because he did not wish to remove the works from storage at his country house, Schloss Börnicke. There is no evidence of any restrictions placed by the Nazi regime on von Mendelssohn-Bartholdy's ability to send his art out of Germany.

26. Von Mendelssohn-Bartholdy also sold major works from his collection in the early 1930s through Thannhauser and other dealers, including the well-known Parisian dealer, Paul Rosenberg of Galerie Rosenberg, and the Berlin émigré dealer, Walter Feilchenfeldt in Zurich. There is no evidence of any restrictions on or duress with respect to any of those sales, or that he received less than fair value.

27. On September 22, 1927, von Mendelssohn-Bartholdy married his second wife, Elsa, and gifted his art collection to her as a wedding present. At the time of her death in 1986, Countess Kesselstatt resided in Ascona, Switzerland. She was survived by a daughter whose whereabouts is not known to plaintiffs.

28. Adolf Hitler became Chancellor of Germany in January of 1933. The Nazi party program to deprive Jews of their German citizenship and their rights as citizens began thereafter and became official State policy with the passage of the Nuremberg Laws in September 1935, effective January 1936. Under these laws von Mendelssohn-Bartholdy, were he still alive, would have been considered Jewish, but his second wife, Elsa, would not. Up until the time of von Mendelssohn-Bartholdy's death in May 1935, the prominence and social and economic standing of the von Mendelssohn-Bartholdy family, and the prevalence of Protestantism among the family since the mid 1800s, mitigated the impact of Nazi anti-Semitism on von Mendelssohn-Bartholdy. There was no restraint of his freedom of movement, his right to serve as a director of the bank, or his ability to transfer artwork or other assets. This lack of restriction applied *a fortiori* to his wife, who was Christian.

29. There is no evidence that von Mendelssohn-Bartholdy or his second wife suffered pressure to sell their art through any discriminatory measure, nor is there any indication that they were restricted in their ability to receive proceeds of art sales or to freely utilize the

proceeds of art sales in any currency. It does not appear that any exit taxes (*Reichsfluchtsteuer*) or discriminatory taxes were ever levied, nor were their personal assets ever restricted through blocked accounts (*Sperrkonto*).

30. Indeed, on March 23, 1933, von Mendelssohn-Bartholdy sent five paintings by Picasso to Basel, Switzerland. They were shipped by the Berlin art transporter, Gustav Knauer, to the Kunstverein Basel, where they were received by Christoph Bernoulli (“Bernoulli”), a Swiss art dealer with whom von Mendelssohn-Bartholdy and his extended family had a long-standing association. Bernoulli then sent the Picasso paintings to storage in Basel. No restrictions or hindrances on the transfer were erected by the German government. The works were granted a year-long renewable customs clearance. There is a strong probability that these five paintings were the same five paintings later sold to Thannhauser, including the Paintings.

31. In July 1934, von Mendelssohn-Bartholdy informed Rosengart of his willingness to part with five Picasso paintings “eventually, for a good offer.” These paintings are the same five paintings, including the Paintings, later sold to Thannhauser.

32. In October of that year, the Paintings were included in a Picasso exhibit at Galeria Mueller in Buenos Aires, which was organized in collaboration with Thannhauser. Again, no restrictions or hindrances on the movement of the Paintings were erected by the German government.

33. By August 31, 1935, the five Picassos, including the Paintings, had been sold or transferred to Thannhauser. On that date, they were listed in a register entry of Galerie Thannhauser under numbers 1649 to 1653 with an indication that they came from the collection of von Mendelssohn-Bartholdy. The actual date of the sale and the amount paid for the Paintings

is unknown. Because there is no record of a shipment on or around this date and it is not known if the Berlin or the Lucerne branch of the Galerie received the paintings, it is distinctly possible that these paintings never returned to Germany after being exhibited in Buenos Aires. This was consistent with the actions of the Galerie at that time. In 1932, for example, Thannhauser instructed the Zurich Kunsthaus to return exhibition loans not to the Berlin branch, but rather to the Lucerne branch of the Galerie Thannhauser.

34. On the evening of May 10, 1935, von Mendelssohn-Bartholdy died, and was survived by his second wife Elsa and his four sisters. His younger brother Alexander had passed away in 1917. In February 1935, von Mendelssohn-Bartholdy estimated his own personal assets, exclusive of prior gifts to his wife and familial property, to be valued at RM 1,700,000, which was a significant sum. At the time of his death, von Mendelssohn-Bartholdy maintained and alternatively resided at the properties Schloss Börnicke, Alsenstrasse 3/3a, and also at Gartenhaus Schloss Bellevue, a pavilion on the grounds of one of the Berlin royal palaces. In addition, von Mendelssohn-Bartholdy had substantial assets in locations outside of Germany, including Holland, Belgium, and England. The five Picasso paintings sold to Thannhauser, including the Paintings, represented a small fraction of von Mendelssohn-Bartholdy's net worth.

35. On February 8, 1935, a few months before his death, von Mendelssohn-Bartholdy executed a will, superseding his earlier will of 1910, which affirmed that he had gifted his entire collection of paintings to Elsa on the occasion of their marriage in 1927, and therefore his art collection was specifically excluded from the estate. Elsa received from the estate an outright interest in the property belonging to the marital household and the wedding gifts, and a lifetime interest in the rest of his estate, with the remainder subsequent interest being given to von Mendelssohn-Bartholdy's four surviving sisters, including Schoeps' grandmother.

36. Von Mendelssohn-Bartholdy's funeral was held five days after his death, on May 15, 1935. Immediately following the funeral, the beneficiaries of von Mendelssohn-Bartholdy's will, including his four sisters, met at Schloss Börnicke in the presence of von Mendelssohn-Bartholdy's pastor and lawyer, and signed a legal protocol representing their official acceptance of the February 1935 will as valid and legally binding and expressly ratifying the 1927 inter vivos gift of von Mendelssohn-Bartholdy's art collection to Elsa and confirming her right to dispose of that collection. Defendant Schoeps' grandparents, Marie Busch (née von Mendelssohn-Bartholdy) and her husband Felix Busch, were both signatories to this protocol. In 2004, when the Picasso painting *Boy with a Pipe*, which Elsa had sold in 1949, commanded a price of more than one hundred million dollars at auction, Schoeps himself affirmed that Elsa had had the legal right to sell the painting, although he questioned her morality in doing so.

37. The German courts approved the Inheritance Certificate in December 1935, and von Mendelssohn-Bartholdy's estate was finally resolved in January 1939, when Elsa inherited RM 847,201.91. Elsa also inherited significant shares in the family banking and business assets in Germany, Holland, England and elsewhere. There is no evidence of any Nazi seizures, special payments or release of estate funds to restricted bank accounts following von Mendelssohn-Bartholdy's death.

38. After his death, von Mendelssohn-Bartholdy's widow continued to reside at Schloss Börnicke, Alsenstrasse 3/3a, and Gartenhaus Schloss Bellevue. In August 1938, several years after von Mendelssohn-Bartholdy's death, Elsa sold Alsenstrasse to the authorities in what may have been an eminent domain condemnation as the house was located on a site intended by Albert Speer for an ambitious development plan for Nazi government buildings. In 1936 and 1938, Elsa sold limited parcels of the over 1000 hectares of land surrounding Schloss

Börncke in accordance with new Reich policies of land settlement but, after she remarried Austrian Count Max von Kesselstatt, they resided together at Schloss Börnicke. In March 1943, Elsa arranged to let the property to the Swiss Embassy until the spring of 1945, when she fled to Switzerland as the Soviet army approached. After her departure, Schloss Börnicke was seized by invading Soviet forces. Today it is a cultural center, tourist destination and concert site.

39. Von Mendelssohn-Bartholdy continued as a director of Mendelssohn & Co. until his death in 1935, at which point his widow Elsa became a silent partner. No family member relinquished their ownership interest until 1938. Harold James in *The Deutsche Bank and the Nazi Economic War Against the Jews* states: "Mendelssohn remained a successful bank for the first five years of the Nazi regime [1933-1938] and continued to be a member of the consortium issuing government debt." See Harold James, *The Deutsche Bank and the Nazi Economic War Against the Jews*, Cambridge University Press, 2001, at 70. In December 1938, the three Mendelssohn family members considered Jewish under the Nuremberg laws stepped down as owners, and the process of liquidating the bank began in January 1939 under the leadership of the non-Jewish family members, including Robert von Mendelssohn, and long-standing bank staff member, Dr. Ferdinand Kramer. The bank was acquired by Deutsche Bank in 1941-1942. Elsa and other non-Jewish family members maintained their holdings as partners and major shareholders in Mendelssohn & Co. until its acquisition by Deutsche Bank.

40. Throughout her life, Elsa was active in the art market and stayed in contact with and made sales through dealers including Bernoulli, the dealer to whom the five Picasso paintings had been sent in 1933. A number of paintings from von Mendelssohn-Bartholdy's collection remained in Elsa's possession until at least the early 1950s, including important works by Picasso, Henri Rousseau and Vincent van Gogh. Members of the von Mendelssohn-

Bartholdy and Kesselstatt families remained in ongoing contact with Thannhauser and are registered as visitors to the Galerie Thannhauser in New York in the 1950s.

41. Elsa made vigorous post-war claims for the loss of property such as the familial estate, Schloss Börnicke. She pursued every avenue to gain compensation for or the return of the property, regardless of the complexity and difficulties of pursuing such a fight against the Soviet and occupation authorities. Despite her efforts, she was unsuccessful.

42. The von Mendelssohn-Bartholdy family also engaged in restitution and compensation actions in Berlin for their losses related to the Mendelssohn & Co. Bank, and in 1968 received DM 75,000 from the authorities, which constituted the highest level of compensation payable for such a claim.

43. Thannhauser made post-war restitution and compensation claims for his payments of the *Reichfluchtsteuer*, *Judenvermögensabgabe*, and the costs of immigration in 1937, as well as the loss of considerable art, furniture, rare books, and gallery archives due to Nazi-looting of his Parisian home during the German occupation of France.

44. Thannhauser's business records also show that after the war, he vigorously contacted owners of works that he had kept on consignment outside of Germany during the Nazi regime, and either returned the works or sold them on behalf of the owners or their heirs.

45. Neither Elsa, who resided in Switzerland for more than 50 years after the Paintings were sold to Thannhauser, nor any of the von Mendelssohn-Bartholdy family members ever made any claim for restitution or compensation alleging the loss or forced sale of the Paintings.

## SCHOEPS' CLAIMS

46. On March 28, 2007, defendant's counsel wrote separately to each Museum, stating that he was investigating the alleged duress sale by von Mendelssohn-Bartholdy of the Paintings, and asking for access to the Museums' provenance information for each of the Paintings.

47. Pursuant to the Museums' general practices, they each agreed to provide Schoeps' counsel with the same access to the Museums' provenance files and archives that they generally provide to bona fide researchers.

48. The Museums invited Schoeps' counsel to provide them with any and all information he had relating to the Paintings' provenance to allow the Museums to take that information into consideration when evaluating Schoeps' claims.

49. Schoeps' counsel reviewed the provenance files at each Museum, and then requested and the Museums granted, an extension from August 14, 2007, until November 1, 2007, to make his written presentation to the Museums.

50. In two letters to the Museums, each dated November 1, 2007 (the "November letters"), Schoeps' counsel set forth his client's claims of title to the Paintings, and demanded that the Museums return, or agree to return, the Paintings to his client within 11 days of the date of the letters.

51. According to the November letters, Schoeps' claims to the Paintings are based on the allegation that defendant is entitled to recovery of the Paintings under the New York law of conversion, replevin, restitution and constructive trust, because von Mendelssohn-Bartholdy allegedly sold the Paintings in Germany under duress from Nazi persecution. He argues that a presumption of duress applies to the facts and circumstances presented here.



52. After careful consideration and based on recent independent research into the provenance of each Painting, the Museums decided to reject Schoeps' demand. In light of Schoeps' counsel's claim in the November letters that he would take whatever action necessary to preserve his clients' rights, and in light of the Museums' obligation to protect assets held on behalf and for the benefit of the public, the Museums commence this action.

#### REASONS SCHOEPS' CLAIMS LACK MERIT

##### There Is No Presumption Of Duress Or Confiscation

53. Defendant contends that, on the facts and circumstances of this case, there is a presumption of duress such that he need not prove duress or a "forced" sale but rather the Museums must prove the absence of duress and a voluntary sale.

54. Schoeps' contention is without merit. Under the laws of New York, Germany, and Switzerland, there is no presumption of duress applicable here. To void a sale or a transfer of title, a claimant must establish actual duress, through physical or mental coercion, sufficient to overcome voluntary choice. Schoeps relies on a presumption established by Military Government Law No. 59 § 375(b), a federal law enacted in 1947, that any transfer or relinquishment of property by a persecuted person in Germany within the period January 30, 1933 to May 8, 1945 was an act of confiscation. That presumption does not apply here, because that Military Law is no longer in effect and because claims under the Military Law could only be made against the state, and not, as Schoeps is attempting to assert here, against private individuals. The German Federal Restitution Act, which provided for a presumption in certain circumstances not applicable here, is not available for claims brought after April 1, 1959. In addition, under that Act there is no presumption of duress because the sale of the Paintings was made to Thannhauser, a private person, with no state or Nazi party involvement in the sale.

Swiss law provides for no presumption of duress. The facts and circumstances here do not justify any presumption of duress.

Even If There Were A Presumption Of Duress, It Is Rebutted By The Evidence

55. Even if there were such a presumption of duress, that presumption is rebutted by the evidence. The facts and circumstances establish that both von Mendelssohn-Bartholdy and his wife were free to decide whether or not to sell their artwork, were free to move artwork in and out of Germany without discrimination, were not under financial pressure to sell as the Paintings represented a negligible percentage of their net worth, and neither the German State nor the Nazi party played any role in directing, urging or otherwise threatening any adverse consequences if the Paintings were not sold to Thannhauser. Nor did the German state or the Nazi party receive any of the proceeds of the sale, either directly or indirectly. The allegation that the Nazi government would force von Mendelssohn-Bartholdy and his wife to sell the Paintings to the Jewish art dealer Thannhauser, whom they knew and with whom they had done business for years, is completely implausible, as is the claim that they had to sell the Paintings because Nazi persecution had left them impoverished.

The Equitable Doctrine Of Laches Bars Schoeps' Claims To The Paintings

56. Defendant Schoeps' claims of title to the Paintings are barred under New York law by the equitable doctrine of laches. Under this doctrine unreasonable delay in asserting a claim will bar that claim if the party in possession is prejudiced in proving its title by reason of that delay. The purpose of the rule is to address the unfairness of allowing a claim to proceed in these circumstances.

57. The Paintings were sold to Thannhauser more than 70 years ago.

58. Defendant Schoeps and his predecessors in interest unreasonably delayed in asserting claims of title to the Paintings. Schoeps provides no indication that any member of the von Mendelssohn-Bartholdy family reported the loss of the Paintings or filed a claim with any of the governmental or non-governmental entities overseeing the restitution of art stolen by the Nazis during the Nazi regime.

59. By contrast, members of the von Mendelssohn-Bartholdy family did actively pursue restitution claims in the post-war period for parcels of land and losses suffered by the family bank.

60. As Schoeps himself recognizes, there is no evidence of any steps taken by him or any members of his family to recover the Paintings until 2005, when Schoeps allegedly discovered information on the Nazi-Era Provenance Internet Portal and on MoMA's website that Schoeps claims suggests the Paintings were sold to Thannhauser in Germany in 1935. Whether or not this is true, and as noted above it is entirely possible that the Paintings were not in Germany at the time of sale and were sold in 1934, the discovery of the alleged location and date of the sale has no bearing on defendant's obligation of reasonable diligence.

61. The Paintings have frequently been exhibited since they were sold in the 1930s. In addition, the Paintings have been publicly displayed in two of the most prominent museums in New York City for decades. *Boy Leading a Horse* has been displayed at MoMA for nearly 70 years, and has been included in the catalogue of MoMA's permanent collection for more than 20 years. In 1992, it appeared on the cover of the catalogue for the Paley Collection exhibition, which toured New York and 15 other cities around the world. *Le Moulin de la Galette* has been on frequent public display at the Guggenheim since 1965, and has been listed in its Thannhauser Collection catalogue for 42 years. The fact that *Le Moulin de la Galette* was

previously owned by von Mendelssohn-Bartholdy is acknowledged in Guggenheim publications as early as 1978.

62. Plaintiffs' ability to defend against Schoeps' threatened claims by proving that the sales were not made under duress or by establishing the exact circumstances of the sales of the Paintings to Thannhauser has been impaired by the passage of time in which Schoeps failed to pursue his claims. For example, despite extensive research, the Museums are unable to determine precisely when Thannhauser purchased the Paintings, whether the sales took place before or after von Mendelssohn-Bartholdy's death, where the Paintings were located at the time of the sale, or how much Thannhauser paid for them. It is also unknown how much Paley paid for *Boy Leading a Horse* the following year.

The Sales To Thannhauser And Paley Are Governed By Swiss Or German Law And Schoeps' Claims Are Barred Under Those Laws

63. New York choice of law rules dictate that questions relating to the validity of a transfer of personal property are governed by the law of the state where the property is located at the time of the alleged transfer. Here, the available facts show a strong probability that the Paintings were in Switzerland when they were sold to Thannhauser. The subsequent sale of *Boy Leading a Horse* to Paley in 1936 definitely occurred in Switzerland. Even if, as Schoeps claims, the Paintings were sold when they were located in Germany, then under New York choice of law rules, the governing law would be the law of Germany.

64. Both German and Swiss laws permit good faith purchasers to acquire valid title to art even if the seller did not have proper title. Indeed, both German and Swiss laws presume that a purchaser acted in good faith, and a plaintiff seeking to reclaim such property has the burden of rebutting that presumption or of showing that the true owner lost the property.

65. Under the German doctrine of *Ersitzung*, title may be obtained by good faith acquisition of property plus possession in good faith, and without notice of defect in title, for the statutory period of ten years from the time the rightful owner loses possession. Under Swiss law, title passes within one year of the date that the location of the allegedly stolen or lost painting was discovered, or thirty years after the loss or theft of the painting.

66. Here, the sale of the Paintings to Thannhauser occurred by August 31, 1935.

67. Thannhauser acted in good faith in purchasing the Paintings. He had a long-standing relationship with von Mendelssohn-Bartholdy whose personal wealth was significant at that time. There is no dispute that von Mendelssohn-Bartholdy and his wife had good title to the Paintings. The available facts give no reason to believe that Thannhauser exerted any duress on them or that Thannhauser could reasonably have believed that the German government was forcing them to sell the Paintings to him, or that von Mendelssohn-Bartholdy and his wife were selling them because they were impoverished due to Nazi persecution.

68. Thannhauser's ownership of *Le Moulin de la Galette* was continuous for over 50 years until his death in 1976.

69. Thus, under German law, if Thannhauser did not immediately acquire good title to *Le Moulin de la Galette* when it was sold to him in 1934 or 1935, then he would have acquired good title ten years after the sale. Under Swiss law, if he did not immediately acquire good title in 1934 or 1935, then he would have acquired good title thirty years after the sale, provided the location of the painting had not been "discovered" before that point, in which case he would have acquired good title a year after such a discovery. In fact, the Guggenheim

began exhibiting *Le Moulin de la Galette* in 1965, and its location has been a matter of public knowledge ever since.

70. Thannhauser's sale to Paley in 1936 of *Boy Leading a Horse* occurred in Switzerland. Paley acquired the Painting in good faith because there existed no facts that he could or should have known that would call into question Thannhauser's title to the Painting. Thannhauser subsequently told Paley that he was the owner of the Painting at the time Paley purchased it.

71. Paley's ownership of the Painting was continuous for almost three decades, and was interrupted only when he gifted the Painting to the MoMA in 1964, retaining a life interest until his death in 1990.

72. Because the Paintings were transferred to the Museums in New York, New York law determines the validity of those transfers. Under New York law, purchasers of goods acquire all title which the transferors had or had the power to transfer. Here, Thannhauser obtained good title to *Le Moulin de la Galette* from Elsa or von Mendelssohn-Bartholdy, or acquired good title through his good faith at the time of the purchase and his continued ownership of the Painting for either ten years under German law or thirty years under Swiss law, and therefore conveyed good title to the Guggenheim. Here, also, Elsa or von Mendelssohn-Bartholdy conveyed good title to *Boy Leading a Horse* to Thannhauser. Paley obtained good title from Thannhauser or acquired good title through his good faith at the time of purchase and his continued ownership of the Painting for thirty years. Paley then conveyed good title to MoMA. Therefore, the transfers to MoMA and the Guggenheim were valid, and the Museums have good title to the Paintings.

In Any Event, Schoeps Is Not The Rightful Claimant To The Paintings

73. In any event, even were the sale of the Paintings to Thannhauser invalid, Schoeps is not the rightful claimant to the Paintings, because they had been gifted to Elsa in 1927, before they were sold to Thannhauser, which gift was confirmed in 1935 by the beneficiaries of von Mendelssohn-Bartholdy's will, including Schoeps' grandparents.

74. Schoeps claims to be an heir of von Mendelssohn-Bartholdy. He does not claim to represent Elsa's estate or her heirs.

CLAIM FOR RELIEF

(Declaratory Judgment)

75. Plaintiffs repeat and re-allege each and every allegation in paragraphs 1 through 74 as if fully set forth herein.

76. Plaintiffs are entitled to a declaratory judgment that no presumption of duress applies to the sale of the Paintings to Thannhauser.

77. Plaintiffs are entitled to a declaratory judgment that the available facts establish the sale was not made under duress, whether such a presumption exists or not.

78. Plaintiffs are entitled to a declaratory judgment that defendant's claims are barred by the equitable doctrine of laches because defendant unreasonably delayed in bringing his claims and plaintiffs were prejudiced by that delay.

79. Plaintiffs are entitled to a declaratory judgment that defendant's claims of ownership of the Paintings are barred by the applicable laws of Switzerland or Germany.

80. Plaintiffs are entitled to a declaratory judgment that defendant's claims are invalid because he is not the proper claimant to the Paintings.

81. Plaintiffs are entitled to a declaratory judgment that the defendant has no valid claims to the Paintings.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:


1. Grant plaintiffs the declaratory judgment to which they are entitled as alleged herein; and
2. Grant such other and further relief as the Court deems just and proper.

Dated: New York, New York  
December 6, 2007

Respectfully submitted,

CLEARY GOTTlieb STEEN & HAMILTON LLP

By:

  
Evan A. Davis  
Member of the Firm

One Liberty Plaza  
New York, New York 10006  
Tel: (212) 225-2000

Attorneys for The Museum of Modern Art  
and The Solomon R. Guggenheim Foundation